UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CAROL A. GOUPIL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-34-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from fibromyalgia, olecranon bursitis, affective disorder and mood disorder, is capable of performing a reduced range of light work. I recommend that the decision of the commissioner be vacated and the case remanded for further development.

Pursuant to the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on October 27, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff had severe impairments – fibromyalgia, olecranon bursitis, affective disorder and mood disorder – but that those conditions did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Findings 3-4, Record at 17; that she retained the residual functional capacity ("RFC") to lift twenty pounds occasionally and ten pounds frequently, to stand and walk for six hours out of an eight-hour workday and to sit for six hours out of an eight-hour workday, with normal breaks and the ability to change position as needed, although she must avoid repetitive handling and concentrated exposure to vibrations and mechanical hazards – an assessment that comports with a range of light exertion work, Finding 7, *id*; and that considering her age ("closely approaching advanced age"), education (high school) and vocational background, she was able to perform work existing in significant numbers in the national economy, a conclusion reached within the framework of Rules 202.14 and 202.15 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid"), Findings 9-10, *id*.[2] The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

[2] For SSD purposes, the plaintiff remains insured through December 31, 2004. *See* Record at 13. Thus, there is no need for *(continued on next page)*

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff complains that the administrative law judge's light-work RFC finding is unsupported by substantial evidence of record. *See generally* Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5). I agree.

I. Discussion

As the plaintiff notes, *see id*. at 1-3, in determining RFC the administrative law judge relied heavily upon an RFC assessment performed at the behest of treating physiatrist Ronald Snyder, M.D., in connection with a workers' compensation claim, *see* Record at 15-16 (hearing decision), 218-28 (Snyder RFC).

In a section of the detailed December 7, 1999 Snyder RFC titled "Workday Tolerance Recommendations: 4 to 6 Hours," the plaintiff was reported to be capable of sitting for five to six hours (in fifty-minute durations), standing for two hours (in twenty-minute durations), walking for three to four hours (occasional, short distances) and using upper extremities for an hour (in five-minute durations). *See id*. at 219. The study's overarching recommendation was that the plaintiff "return to work at two hours,

a bifurcated analysis of eligibility for SSD and SSI.

progressing to six within the parameters outlined in the two page overview given the duration she has been out of work." *Id*. at 218.

The plaintiff complains that the administrative law judge misconstrued these findings by, *inter alia*, selectively seizing upon the stated sitting, standing and walking tolerances while omitting the stated durational limitations (including the overall limitation to a four- to six-hour workday). *See* Statement of Errors at 2-4. The criticism is well-taken. Although the administrative law judge describes his RFC findings as consistent with the objective medical evidence of record, s*ee* Record at 15, they are not consistent with the Snyder RFC, which indicates that the plaintiff is capable merely of easing into a workday of at most six hours' duration.

The Snyder RFC is not the only RFC assessment of record. A second RFC by non-examining Disability Determination Services ("DDS") consultant Lawrence P. Johnson, M.D. (which is cited by the administrative law judge), *see id*. (citing Exhibit 4F), fully corroborates the administrative law judge's RFC findings, *see id*. at 169-76 (RFC report dated November 8, 2000 by Dr. Johnson).[3] Whether such a report can constitute substantial evidence depends on the circumstances. *See, e.g., Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) ("[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert. In some cases, written reports submitted by non-testifying, non-

[3] The Record also contains a third RFC completed on June 15, 2000 by Tom Crutcher, SDM. *See* Record at 153-60. At oral argument, counsel for the commissioner clarified that the term "SDM" stands for "Single Decision Maker" and that SDM Crutcher was a Social Security Administration employee with no medical credentials. Counsel explained that, as part of an experiment initiated in New Hampshire and Maine to expedite processing of applications, SDMs have been rendering initial decisions, with a medical expert (such as Dr. Johnson in this case) being consulted only upon reconsideration, if any. Counsel agreed with the proposition that, for purposes of review by this court, a decision by a non-medical SDM such as Crutcher is entitled to no weight.

examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.") (citations and internal quotation marks omitted).

In this case, I am unpersuaded that the Johnson RFC can carry the weight of constituting substantial evidence in support of the administrative law judge's RFC findings, at least in the absence of further clarification. Although the Johnson RFC postdates the Snyder RFC, it does not mention it.[4] *See id*. at 169-76. This omission in my view significantly diminishes the weight of that report, whether it results from lack of access, or insufficient attention, to the Snyder RFC. As the administrative law judge recognizes, the Snyder RFC is a critically important study, performed at the behest of a treating physician and entailing hands-on testing of the plaintiff's capabilities. Dr. Johnson's implicit rejection of the Snyder RFC findings cries out for a cogent explanation. None is provided.[5]

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for further proceedings consistent herewith.[6]

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[4] The Johnson RFC does refer, without attribution, to the contents of a June 22, 1999 report of a physical examination of the plaintiff conducted by Dr. Snyder. *Compare* Record at 170, 174 (Johnson RFC) *with id*. at 190-91 (June 22, 1999 report of Dr. Snyder).

[5] At oral argument, counsel for the commissioner posited that the administrative law judge's RFC findings are supported by a five percent whole-person impairment rating made by Dr. Snyder in April 2000 (several months after the Snyder RFC), which in counsel's view demonstrated improvement in the plaintiff's condition subsequent to the Snyder RFC. *See* Record at 229-30. In response, counsel for the plaintiff argued that a whole-body impairment rating has nothing to do with RFC. Counsel for the plaintiff has the better of the argument. *See Carson v. Barnhart*, 242 F. Supp.2d 33, 39 (D. Me. 2002) (a permanent-impairment rating "is not directly 'usable' for purposes of analysis under Social Security regulations. The regulations require medical evidence of specific physical limitations rather than conclusory estimates of overall impairment of a body part.") (citations and footnote omitted).

[6] At oral argument, counsel for the plaintiff amended her statement of errors to seek remand for payment of benefits, arguing that (i) the administrative law judge purported to embrace the Snyder RFC, and (ii) the Grid directs a conclusion that a claimant with an RFC like that found by the Snyder RFC (as correctly interpreted) be found disabled. While clarification by Dr. Johnson (or, alternatively, fresh consideration by another medical consultant) certainly is warranted, followed by reconsideration of Steps 4 and 5 of the sequential-evaluation process, it is not a foregone conclusion that the commissioner must, on remand, embrace the Snyder RFC. *See Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001) ("[T]he rule we adopt is that ordinarily the court can order the agency to provide the relief it denied only in the unusual case in which the underlying facts and law are such that the agency has no discretion to act in any manner other than to award or

(continued on next page)

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of October, 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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to deny benefits.").

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